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In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

ENERGY ACTION EDUCATIONAL FOUNDATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Anxious to avoid subjecting the Court to much more of our dull prose (see Resp. Br. 1), we submit only the briefest reply to respondent's unrestrained arguments.

1. For obvious reasons, respondents largely ignore the statutory text and pitch their case on legislative history. They find there a Congressional concern with the traditional bidding formula, which, among other things, was thought to restrain competition and favor only the largest companies. Whatever the merits of that appraisal, we do not question that Congress believed there should be some degree of experimentation with bidding schemes other than the prevailing system under which royalty was fixed at 16 2/3% and leases were awarded on the basis of relatively large "front-end" bonus bids. But whether the many references to "bonus bidding" cited by respondents actually referred to this historical scheme or, more comprehensively,

all systems involving a cash bonus as the bidding element is not entirely clear on the face of the debates and reports. As the case is presented by respondents, the issue is how one resolves that ambiguity.

Our submission is that the statute itself is so plain that there is no pretext to explore the legislative history. Moreover, if we must follow respondents into that thicket, performing the task of statutory construction in reverse, we believe the fair inference from what was said and written is the same. But even accepting that some of the expressions encountered in the debates and reports can be viewed as ambiguous, one is surely entitled to settle any doubt by looking to the words of the law as it was ultimately enacted. The final text, intended to be given statutory force, must be taken to represent the ultimate Congressional resolution of any earlier hesitations, or vascillations, or contradictions. The statute is, after all, the last statement of intent; it is, moreover, the only formal and binding expression of the legislative will.

There may be rare occasions when one is justified in disregarding even plain statutory language when it is wholly at odds with incontrovertible evidence of a different legislative intent, or when the words of the statute, read literally, produce absurd results that one ought not attribute to Congress. This is no such case, however.

Here, the most respondents can demonstrate is that the legislative history is inconclusive. To be sure, there may have been individual Members who shared the special enthusiasm of respondents—some of them active advocates during the framing of the 1978 OCSLA Amendments—and who would have mandated bidding on a profit share or work commitment basis. But the more authoritative statements of the legislative concensus are wholly consistent with the broader administrative discretion reflected in the enacted statute. Reading the committee reports alone, it

might perhaps be possible to suppose that subscribing members viewed all bonus systems as one and meant to require the Secretary to offer some leases under schemes where bonus was not the variable. That is not, however, the only plausible interpretation, or the most likely. And when we look at the text that emerged, we know Congress did not take this view, but, on the contrary, expressly distinguished between the traditional system and other bonus bidding formulae. There is no contradiction: the statute merely resolves any ambiguity in the reports.

Nor can the plain meaning of the statutory text be rejected on the ground that it would defeat the legislative objective, or otherwise lead to improbable consequences. Indeed, it is obvious that any concern about the anti-competitive effects of the traditional scheme under which a relatively large front-end cash bonus was required could be satisfied without eliminating bonus bidding. All that was necessary was to diminish the prominence of that ingredient in the formula, although retaining cash bonus as the bid variable. This could be accomplished by increasing the fixed royalty above the traditional 1/6th, or by establishing a sliding-scale royalty that would yield, in the aggregate, more than 1/6th, or by providing for payment of a share of net profits in lieu of or in addition to a fixed royalty, or by requiring a substantial fixed work commitment combined with a reservation of royalty or fixed net profit share, or both, or by any other combination of larger "downstream" payments with a cash bonus bid.

So, also, these variants in bonus bidding systems, introducing new elements, would provide some indication of the virtue of the profit-share, work commitment, and sliding-scale royalty schemes in maximizing government revenues and encouraging production. At the least, it was reasonable for Congress to take that view and to treat the new bonus bidding systems now authorized as significantly different

alternatives to the traditional formula. Accordingly, it is not surprising that the statute permits the Secretary to adhere to bonus bidding, provided only he experiments with systems that also include new ingredients.

2. Turning briefly to the statutory text, respondents attempt to define the Secretary's discretion: "the discretion left the Secretary was not *whether* to test promising new leasing systems but only *where* and *when* to apply a particular new system" (Resp. Br. 20-21). On its face, this means that, within the five-year period beginning with enactment of the OCSLA Amendments in 1978—or perhaps during each of those years—the Department of the Interior must offer some leases under each and every one of the alternative bidding systems. Yet, respondents themselves seem to lack the courage of their convictions, being apparently willing to excuse the Secretary from experimenting with certain listed schemes, notably those in which royalty is the bid variable. See Resp. Br. in Opp. 23-25 & n.14.

A sufficient reason not to press the point to its logical conclusion is that the number of alternative bidding systems embraced by the OCSLA Amendments is far too large. There are at least ten different schemes enumerated in Section 8, and each is subject to adjustments in the relative prominence of the several ingredients characterizing the particular mixture, which can significantly alter the equation. When one adds the "catch-all" provision of Section 8(a)(1)(H), the variety of possible combinations is multiplied manifold. Obviously, no one could insist that every possibility be used. There is, to be sure, a statutory mandate that, for at least 20% of the total acreage offered each year, bidding systems other than the traditional one must be employed. But *which* ones is left to the Secretary. The statute does not prefer one alternative scheme over another: the Secretary must make that choice, in his discretion.

3. Respondents press a further argument: that by adhering to bonus bidding, whatever the other ingredients of the total formula, the Secretary is violating the Congressional mandate to assure that the government receives "fair market value" for its outer continental shelf mineral resources. The short answer to this contention is that it has never been tried or decided by the courts below. See Pet. App. 94a. At this juncture, there is only a bare allegation, claimed to be supported by statistics which are not admitted and from which no relevant finding of fact has been made. The court of appeals could not, and did not, rest its judgment on any such ground and it would be obviously inappropriate for this Court to affirm on the basis of these untested allegations.[1]

At all events, there are fundamental flaws in respondents' "fair market value" argument. First, the market value of a mineral lease when first granted cannot be measured in terms of the value of the oil and gas ultimately extracted. Obviously, the varying costs and risks of exploration and development affect the market price any bidder will offer, especially in the unproven areas of the outer continental shelf where drilling is both extremely costly and very hazardous. In some circumstances, the best return that can be obtained is a relatively small percentage of the gross value of the minerals. In a different situation, that percentage will be significantly higher. And, in those cases where no production is ultimately obtained, any bonus received will be a windfall to the government, wholly unrelated to the actual worth of the resource, although it accurately represents the fair market value of the right to explore at the time it was offered.

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[1]Equally unsubstantiated is respondents' repeated claim that the experience of California—very limited and obviously distinguishable—demonstrates the benefits of net profit share bidding. That contested proposition is not supported by any trial court finding.

The last example illustrates the benefit to the United States of insisting on a substantial bonus payment in all cases. No doubt, in some recent instances, the amount paid for the lease, even though fair at the time, may have appeared inadequate when measured against the greatly inflated value of the oil extracted a few years later. But that seeming disparity—partly offset by the greater worth of the dollars received at the time of leasing and increased tax revenues—is attributable to an unusual and unforeseen escalation in oil prices and cannot properly be criticized as a failure to obtain "fair market value" for the leases when granted.

Nor is it possible to say that Congress meant to foreclose such a result by requiring all leasing to be conducted on a net profit share basis. On the contrary, respondents do not now dispute that the Secretary is commanded to use the traditional cash bonus system for at least 40% of the acreage leased each year, and is authorized to use other bonus bidding formulae for at least some of the remaining acreage. It must follow that Congress did not view bonus bidding as violating the mandate to obtain "fair market value."

Finally, we must stress that the OCSLA Amendments do not treat maximizing federal revenues as the sole objective. Assuring maximum production without delay—to mention only one other—was also a goal of the Amendments. Hopefully, both things could be achieved. But, in some instances, these two objectives conflict and a balance must be struck. Reasonably enough, Congress left it to the Secretaries of Energy and Interior to determine, within broad limits, the most appropriate means to implement the stated goals. There is simply no basis for concluding that either Secretary has abused his discretion and engaged in a "giveaway." And, in any event, the scheme of the OCSLA suggests that Congress has reserved to itself the function of deciding that

question by requiring regular reports from both Secretaries and insisting upon prior submission of any new bidding system not specifically provided for. It is very doubtful that judicial appraisal of various bidding formulae was ever contemplated. See J.A. 193.

4. On the standing issue, the State respondents now invoke Section 8(g) of the OCSLA Amendments, 43 U.S.C. (Supp. III) 1337(g), which provides for agreements between the United States and coastal States "in order to permit [the] fair and equitable division" of revenues derived from federal leases which drain oil or gas partly underlying State lands. Misleading terminology aside, the basic fallacy of the argument is the premise that the "fair and equitable" share of revenues to which the State is entitled in drainage situations is necessarily a percentage of actual revenues based on the relative volume of oil or gas in the common pool on either side of the boundary line. That is no doubt one formula for apportioning revenues. But we do not suppose the State would be barred from claiming a larger share of the actual receipts if, in a suit to implement Section 8(g), it could demonstrate that the Secretary, under any bidding system, was deriving a grossly inadequate proportion of the total revenues, having indulged in a "giveaway" in favor of his lessee. In the unlikely event of such proof, Section 8(g) provides a remedy, short of interfering with the Secretary's leasing decisions.

At all events, it is clear that Section 8(g) was not intended to make the State a "co-lessor" with the United States, with a right to participate in selecting a bidding system affecting the common pool. Indeed, such a proposal was suggested and rejected by Congress. Compare H.R. Rep. No. 94-1084, 94th Cong., 2d Sess. 12-13, 95-97, 260 (1976), with H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 14-15, 219-220 (1977). Under the OCSLA Amendments, as under the original Act, leasing OCS lands remains a wholly federal matter. If the Secretary chooses to employ only the traditional

bidding system within the "border zone" potentially subject to Section 8(g), reserving the alternative bidding schemes for more seaward areas, that is a decision in which the States have no role. They have no standing by virtue of Section 8(g) to narrow the exercise of that statutory discretion, any more than they can insist on a higher or lower royalty rate, or dictate the place or time of lease offers.

5. Finally, we address a short rebuttal to respondents' suggestion (Resp. Br. 5 n.1) that the Secretary of Energy no longer has any interest in the case. To be sure, the Department of Energy has now promulgated final regulations covering the two bidding systems favored by respondents. But that was done under compulsion of a district court order implementing the court of appeals' mandate. As the preamble to each regulation makes clear, the Secretary of Energy entertains reservations about those systems. If he were freed of the judicial command, he might wish to withdraw one or both of the regulations, or to suspend them pending further study.

It remains important to the Department of Energy to vindicate its own discretion under the Act. As matters now stand, that Department has been compelled to issue regulations without having satisfied itself of their efficacy. Arguably, the decision below will not be satisfied until regulations are promulgated for every other alternative bidding system contemplated by the Amendments. At all events, if the Interior Department's position prevails, it would be anomalous to continue to require the Department of Energy to study and revise regulations respecting bidding systems that the Secretary of the Interior does not intend to invoke. The unavoidable burdens of the government are heavy enough without adding to them the wholly wasteful duty of devising further regulations that will never be implemented.

For the reasons stated here and in our principal brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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